

**TIGARD WATER DISTRICT  
BOARD of COMMISSIONERS MEETING**

*Serving the Unincorporated Area*

**Monday, April 24, 2006  
7:00 p.m.**

*Members Present:* George Rhine, Janet Zeider, Marc Delphine, Charles Radley and Beverly Froude

*Staff Present:* Dennis Koellermeier, Michelle Wareing, Twila Willson and Joy Koss

*Visitors:* Clark Balfour, Kesmira McVey, Isador Morigavi, Phil Decker, Lisa Hamilton-Treick, Kinton Fowler, Barb Sherman and Moriah Balingit

**1. Call to Order, Roll Call and Introductions**

The Tigard Water District (TWD) meeting was called to order by the Chairperson, Commissioner George Rhine, at 7:09 p.m. and staff called roll. All board members were in attendance.

**2. Approval of Minutes – January 23, 2006 and Special Meeting on March 20, 2006**

Commissioner Beverly Froude motioned to accept the minutes of the **January 23, 2006** meeting, Commissioner Janet Zeider seconded the motion and the board voted unanimously to approve the minutes of the meeting as presented.

Following a brief discussion of the Special Meeting minutes of **March 20, 2006**, Commissioner Delphine motioned to approve the minutes of the meeting, Commissioner Froude seconded the motion and the board voted unanimously to accept the minutes as presented.

**3. Visitor Comments**

(Commissioner Rhine revised the order of the agenda items to accommodate the finance staff and attorney.)

**5. Beginning of Budget Process**

Dennis Koellermeier introduced Michelle Wareing, City of Tigard Financial Analyst and tasked with helping the board meet public budget law and prepare the budget.

- **Discuss Proposed Budget**

Ms. Wareing handed out a draft proposed budget to the board and asked the board for their recommendations. The beginning balance for Total Resources is \$111,836. Mr. Koellermeier and Ms. Wareing advised the board to aim for the most flexibility by appropriating the entire amount of money. A general discussion of fund allocations for specific line items took place. It was decided the remainder of the funds would be placed in contingency.

- **Present Budget Calendar**

Ms. Wareing will complete the expenditure estimates for distribution to the board before the next meeting.

- Appoint Budget Committee – Commissioner Rhine invited members of the audience to use the sign-up sheet to indicate interest in participating on the Budget Committee.

#### 4. Legal Council Report – Clark Balfour

Board members previously received and had an opportunity to review Mr. Balfour's Opinion Letter. Mr. Balfour introduced himself as a lawyer with Cable Huston, practicing for 26 years, specializing primarily in local government work (in particular, water districts, wastewater districts, people's utilities districts). He was asked to look at questions regarding the Canterbury reservoir and a portion of the property that may be considered excess and not necessary for water system improvement. Summarized:

- The IGA creating the Intergovernmental Water Board (IWB) had provisions that defined the two types of assets: a system asset and another asset.
- This is a single parcel of property (there are not two separate tax lots).
- This property and the assets on it are system assets (land and improvements).
- The IWB needs to make decisions as dictated by the terms of the agreement
- Disposition or transfer of assets needs to be determined by the entire IWB and requires unanimity in that decision. (History shows the Menlor reservoir site was treated in that same fashion.)
- Each IWB entity should weigh its necessity for future operation of area water system.
- Reasonable basis is needed if an entity were to descent from that position.

(Commissioner Marc Delphine departed at 7:44 p.m.)

Mr. Balfour was also asked what it would mean if the City of Bull Mountain is formed:

- IGA references various statutes regarding city annexation, withdrawal of district infrastructure
- Statutes cited deal with the partial annexation of a district
- Statute 222.510 applies when a city takes the entire area of a water district, the water district is automatically extinguished with all its assets, obligations and responsibilities going to the city.
- If the City of Bull Mountain were formed and it encompassed the entire remaining territory of the TWD, upon formation, this district would cease to exist and TWD would go through a process as board of trustees to hand over all assets, transfer deeds and whatever else is necessary.
- IGA says obligations under the IWB cannot be transferred without their consent
- By operation of law, the new city would automatically succeed to the interests of this district and they would become members of the water board, but that could be a matter for litigation if one of the other three cities decided that was not a good result and wanted to contest it.
- Mr. Balfour thought the state statute would prevail.

Recap of additional discussion topics, including Mr. Balfour's comments:

- TWD would remain for any remnant not included in the City of Bull Mountain formation
- TWD committed its cooperation to manage the system as a whole and pledged to the City of Tigard who undertook those operating functions when it signed the IGA.
- TWD may be required to sign a deed or transfer document
- IWB has to decide if all this property is needed or not
- IWB has to authorize the city and staff to partition property in order to create the unencumbered piece for whatever those uses are.
- Under TWD's duty of cooperation, they would either convey property by deed to the City, or because they have already designated it as not necessary for water system service, it would automatically migrate over to the other asset category.
- Property in other asset category automatically becomes property of jurisdiction where it is located.
- If Tigard asked the TWD to sign a deed over, TWD would have to cooperate
- Mr. Koellermeier originally proposed to the board the possibility of designating a portion of the property as surplus and with Mr. Balfour's analysis, the appropriate step would be for the city to now formulate a plan and run that plan by this board and to the IWB.

- TWD's authorized IWB representative would vote on that issue based on their decision.
- Mr. Koellermeier recommended partitioning lot somewhere near the current fence lines.
- Mr. Koellermeier requested information from engineering consultants about future use of that property and other than a potential corner to hold as an easement for future well site, the property appears to be of no benefit for future water purposes.
- Surplus property issue arose when the Tigard City Council gave the Parks and Rec. Advisory Board a task to identify potential park and open space improvements. Canterbury site was identified as a large, undeveloped parcel.
- Clarification of words 'transfer' and 'pledge' when referring to assets: 'Transfer' typically means to hand over and often has an underlying premise of to convey title. 'Pledge' is usually a right-of-use, often appears in the context of a security, e.g., I 'pledge' this asset to you to secure the debt.
- That language was used in the agreement in several different places, talking about the ability of the City of Tigard to act as manager of the water system.
- There have been discussions about tuning up this agreement to make it clearer.
- IWB does not have its own legal council has historically used the city's attorney, although one of the board members is an attorney.
- A suggestion was made that the site should be leased to the city for \$1 a year, but was questioned as necessary or appropriate under this agreement.
- Mr. Balfour did not look at whether the IWB wanted to obtain some return for system asset now determined as surplus. TWD has the right to determine what the terms of the transfer are.
- Mr. Koellermeier summarized it as either a system asset or another asset. If a system asset, it is pledged for use. If it is not necessary for that use, it is already another asset. He could not see a third option where the board can declare it surplus to IWB and then market it. Mr. Balfour commented that the agreement did not speak to it and the only example was the Menlor site and is a fair item of discussion when the IWB meets.
- Concerns were expressed about revision to ORS-279 regarding the procurement authority of every agency in the state. Mr. Balfour commented that in 2003 legislature adopted statutes that amended the procurement law governing the rules and obligations any governmental agency has to follow when acquiring goods and services.
- History of the TWD has been that the City of Tigard, as the managing agent, has run those types of processes and they run according to those rules.
- TWD has been doing things through the City of Tigard who went through all of those updates. If TWD is happy with Tigard's rules, just adopt the City of Tigard's rules by a resolution or appoint yourselves a contract review board, adopt their rules, make whatever modifications are wanted but generally follow that and not have to create a whole new document. It is not a difficult thing to do, however, authority to deal with surplus property is adequately covered already.
- Mr. Koellermeier stated the real issue was whether the board needed to deal with this issue separately from the fact that the city was their business agent.

## 6. Update on Bylaws and Bylaw Modifications

Commissioner Rhine commented there were underlying questions that the by-laws adopted in 1990 were not covering well what TWD does currently and there was a need to adopt a new set of by-laws. Mr. Balfour indicated the issue was if there could be objection about Commissioner Rhine being president too long.

Commissioner Rhine added that there were several other issues. One issue that came up was that the chairman could only serve a one-year term. Mr. Balfour commented that the by-laws are procedural, outline conduct of business and how to go about handling your business. Decisions are not going to be upset by a court if TWD failed to follow a procedural issue in the by-laws. Holding a term of office is not something that is going to void any action. Public meetings law provides that a decision of a government agency can only be challenged for a period of 60 days after action is taken. Anything done 60 days ago and beyond is valid and cannot be challenged at this point. The final point to consider was even if the chair's vote was challenged and taken away, would that change the outcome of the remaining voting

quorum. The court would likely say TWD has followed the public meetings law and the fact that one person may have been running the meetings instead of another would not matter because decisions are made in accordance with law and they would not question those decisions.

Commissioner Froude commented that Greer Gaston had looked into this and said the rule had been changed. Mr. Koellermeier commented that she referred to the ORS that governs special districts containing a clause about term of chairmanship and in the last revision did not include any restrictions.

Mr. Balfour explained that the procedure to change the by-laws was a 28 day process. The board wants to work on getting the by-laws in good shape as soon as the budgeting process is over.

## **7. Update on Friends of Bull Mountain's Request to Fund the Comprehensive Feasibility Study Required for Incorporation**

Mr. Koellermeier stated the outstanding question was the participation of this board allocating financial resources to the Bull Mountain group for their study. Before making a decision on the request to fund the study, he recommended that the board seek legal advice on the legality of funding such a study for a non-profit organization, which he believes is the legal terminology of the Friends of Bull Mountain (FoBM), and the repercussions, pro or con, of doing that.

Mr. Balfour made the following statements as to what the board could do as a water district and responded to specific questions from the Commissioners:

- TWD is a special district in this state.
- Authorized to expend money for authorized district purposes.
- TWD has to budget and appropriate those necessary funds and spend them for the water system.
- Water and water-related issues are valid expenditures. To the extent that TWD goes outside those authorized expenditures, they run the risk of personal liability under statute 294.100 which says that if a public official (elected or staff member) expends money for unauthorized or illegal purposes, those people are personally liable for repayment of that money.
- If TWD spends money to help with an incorporation study, they probably have the power to do that if they limit it specifically to those things that are water related. It also makes the assumption that they are going to be the water service provider. To the extent that you keep it limited to water system service in those areas, it probably would be an authorized expenditure of funds. Anything beyond that would be subject to personal liability risk.
- Under very narrow circumstances, TWD could fund part of the study, but should not lose sight of the fact that this district signed an Urban Service Agreement in 2003. That agreement was with City of Tigard, Clean Water Services, Tri-Met, County and Tualatin Valley Water District. TWD and all those other entities agreed the City of Tigard was to be the ultimate provider of urban services from Bull Mountain Road and Roy Rodgers Road up to Scholls Ferry Road.
- If TWD authorizes this expenditure, they essentially are saying they think the City of Bull Mountain ought to be the provider there, they could be in a position of having violated the agreement and that agreement provides that they go through a dispute resolution process with the city (mediation and binding arbitration process).
- TWD has agreed that water system assets are going to be the City of Tigard's.

Commissioner Radley was concerned with the termination provision, he had not seen the SB-122 agreement, had tried to get a copy from OSU Extension but they could not find it. Mr. Koellermeier said he could provide Commissioner Radley with a copy of the agreement. Commissioner Radley also questioned the board's insurance and to what extent it would defend commissioners against any kind of suing. Mr. Balfour had not looked at the policy for awhile, but typically it was fairly broadly construed coverage, with a recognized defense for good faith reliance under the advice of legal counsel.

Commissioner Radley commented about the gentlemen who say he has a conflict of interest because of his association with the organization, FoBM. He knows those people, socializes with them, has

volunteered his time to help with some of their activities, given them a small sum of money, and he wanted to know if that was some kind of a conflict of interest.

Mr. Balfour responded that typically conflicts of interests arise under the statutes when using your office essentially to obtain something, to avoid a detriment or when somebody is trying to influence decision making. The board is all involved in the community and just because you are a water commissioner, does not mean you have to check your right to associate with other people. A conflict situation is somehow using your position to further something that is either for your own financial benefit or someone else's financial benefit and whether or not you are acting in what you think is the best interests of the water district. To the extent that someone raises those kinds of issues, he doubted it would amount to a conflict based on the facts that Mr. Radley stated. If the commissioner want to back that, then he should say some people have raised issues about whether he has a conflict of interest, he does not believe he has a conflict of interest, get it out on the public record and declare whether he does or not. Even if he has a potential conflict of interest, he can still vote as long as he declares. It is only if he has an actual conflict of interest that he is suppose to abstain from voting.

Commissioner Rhine commented there was a communication received from the FoBM after the presentation several weeks ago concerning the study being done by ECO Northwest that was proprietary data. The message said that although some of the information may be public, the analysis and conclusions (including this article of concerns, etc.) would not be publicly available. It sounds like the TWD was being asked to fund something which was not public data.

Mr. Balfour did not see how the district could publicly fund the study and then have the data be confidential; it has got to be a public record. Once you commit your money to have that study done, at least the section paid for by TWD must be available to the public. They have to see how the money was spent. Commissioner Radley agreed that it should be public and thought Mr. Koellermeier made a comment in the last meeting that if the transaction were to go ahead, there should be some kind of agreement formulated between this board and the other organization; for example, a memorandum of understanding.

### 3. Visitor Comments

Commissioner Rhine opened the meeting for comments from citizens.

Kesmira McVey - 13525 SW Beef Bend Road

Ms. McVey clarified the intent of her prior e-mail and confirmed that the ECO Northwest study would be public. The basis for it is to determine economic feasibility of creating a city. She acknowledged the significant resources and time of the TWD in struggling with this request for funding. Regardless of the outcome, she appreciated the effort made to put due diligence into action and evaluate the option.

Isador W. Morigavi - 15145 SW 119<sup>th</sup>

Mr. Morigavi formally objected to Mr. Radley being on this commission because he was bias. His assertion that he has mere association with the FoBM was incorrect. Mr. Morigavi knows that Mr. Radley was and may still be a member of the Bull Mountain Residents of Incorporation. It is the board's commitment to sit and listen to facts and make a decision they consider to be fair and honest to everyone involved. He did not think Mr. Radley was capable of making a fair and honest decision and wanted that on the record.

Mr. Morigavi addressed the purpose of this survey, which was a requirement by Washington County to determine the economic feasibility of the area on Bull Mountain being incorporated into a city. An economic survey has nothing to do with water use, and any assertion that it would be of value to the water board was without basis. Mr. Koellermeier and his staff do the planning and water services. The study would not contribute toward the stated aim of providing TWD with information to use. If TWD decides to go forward, he would seek legal advice.

Phil Decker - 14540 SW 148<sup>th</sup> Place, City of Tigard, unincorporated Washington County area.

Mr. Decker's stated FoBM dated March 10<sup>th</sup> states that one of the first steps of an incorporation process was to prepare a comprehensive feasibility study presenting detailed income and expense data, projections of future population growth and other data. They stated the study would be very helpful to the TWD and requested the District fund their study.

That request appears to be in violation of public contract referred to by counsel earlier. This agency did not opt to design its own public contracting rules. Therefore, the rules that this organization is bound by are set forth in the public contract rules stated in the Oregon Administrative Regulation 137. It is clear that FoBM's request in no way complies with that act. Any payment to or on behalf of FoBM would likewise not be compliant.

If you say we are not going to fund the whole study but just going to fund a part of it which fits under water, any subsequent action will show a diversion to disguise what the true purpose of that expenditure is. Mr. Decker referred to the Special Meeting minutes where remarks were made that the county intends to do planning in areas 63 and 64 and this information would be available to your district free-of-charge. It would be a duty of this board, as part of due diligence, to explore with Mr. Coffee his belief that the study would not be beneficial or valuable to the TWD. We would be paying for something that can either be gotten for free or is unneeded.

Mr. Decker questioned the credibility of FoBM, a political action committee sworn in September 2002 and discontinued a week after the Special Meeting. He reported that a notice of discontinuation of FoBM, a political action committee, was filed with the City of Tigard on April 7, 2006. In the Special Meeting, Ms. McVey, on behalf of the FoBM, responded to a question by Mr. Delphine, stating the FoBM had over 250 active members. A PAC has no members under Oregon law, but only has committee directors. Those committee directors are: Ms. Hamilton-Treick, Ms. McVey, Ms. Russell and Mr. Franzkc and they are the only four people who are with FoBM Political Action Committee. On the same day that they filed notice of discontinuation, they also filed the Articles of Incorporation of a nonprofit corporation. (Mr. Decker distributed to the board a copy of the Articles of Incorporation of FoBM, an Oregon nonprofit corporation filed on 9/4/2002). The FoBM that filed the request for funding was the nonprofit corporation.

FoBM has no members and that was known by Ms. McVey and Ms. Hamilton-Treick on the date of the TWD Special Meeting, because they are the directors. The four directors of FoBM, the nonprofit corporation, are: Ms. McVey, Ms. Hamilton-Treick, Mr. Franzkc and Ms. Russell (who is the primary candidate for mayor of the new City of Bull Mountain should that ever occur). The same four people are the directors of FoBM, the PAC, and the Bull Mountain Residents for Incorporation, a PAC that also has no members.

Mr. Decker suggest to the Board that: a) the application and the applicant FoBM has no credibility, b) they have not been shown all the facts nor have all the true facts been disclosed to them, c) this Board is under a duty to investigate and d) in the event the Board directs a \$34,000 grant or partial grant to enable money to subsidize the expenditure for which FoBM have already made a financial commitment, it will be scrutinized most carefully.

Lisa Hamilton-Treick - 13565 SW Beef Bend Road, unincorporated area of Bull Mountain  
Ms. Hamilton-Treick stated that Mr. Decker said things that were erroneous and that he did not know anything about the FoBM or the Political Action Committee or Bull Mountain Residents of Incorporation. She consider it unfair if the TWD were to make any decisions based on his comment without the opportunity to have FoBM's attorney and PAC board review.

Regardless of the TWD decision, she thanked the board for the sincere effort they made to seek legal counsel and make an informed decision. FoBM will move forward one way or the other, with or without the assistance of the TWD. 8,000 people are trying to solve a problem they did not ask for. If FoBM are successful in November, she hoped they would continue to work together to solve the water issues for Bull Mountain.

There were no other speakers and Commissioner Rhine closed public comment.

Commissioner Rhine not necessarily as Chairman of this Board, thanked everyone for their participation at the last two meetings and, regardless of the outcome, he thought everyone had an opportunity to help the TWD with the decision process. He also thanked all the people that were involved in the FoBM and against the FoBM, because of the importance of citizen participation in deciding what the future should be. It is an emotional issue and obviously people are bias one way or the other in terms of what they decide. Our form of government is to get people together, form a measure and get it onto the ballot to let enough people decide if that is what they want to do or not. For all the personal effort that has gone into it on both sides, that proves the process is working and he again thanked them for their participation.

The board continued the discussion by asking Mr. Balfour if he had more direction before a decision was made. Mr. Balfour said he heard a lot of new things. He said some further exploration should be made before they actually do anything. If TWD were going to go ahead on a limited basis, they would have the ability to select a consultant like ECO Northwest and make a contract directly with them with the defined scope of services for the money, so they were getting the kind of report they wanted. The district always needed to have a say in what the scope of the work was and what the deliverables were going to be so that they stay within their confined purposes. Before actually contributing money to anything TWD wants to make sure they understand completely what this organization is all about. There is not enough known tonight as to how to proceed. Commissioner Rhine summarized that the only thing they could decide tonight was if they did not want to participate.

Commissioner Zeider said there were just too many variables. She was not prepared to go ahead with giving any money in any form at this point. TWD has the City of Tigard, who has done a good job, and advises them and can get a lot of this information they have talked about for free. She could not justify giving out any type of money. She knows where the heart beats for the FoBM and, as much as she would like to help them out, she would have to do that with personal donations.

Commissioner Froude commented that she did not feel this request was within the prevailing water district's authority to do. There is not enough information about water that would come from the study.

Commissioner Radley commented that he may be the dissenting minority, but he felt TWD should continue to process a discussion and exploration on this proposal.

Commissioner Radley made a motion that this board continue to engage in discussion with FoBM to learn more about their proposals and more about the nature of the organization and to determine if there were some aspects of the study that were within their statutory authority to support. No second and the motion died.

Commissioner Froude made a motion that TWD not fund this proposal, Commissioner Zeider seconded the motion and those who voted in favor of the motion were Commissioners Rhine, Zeider and Froude; opposed Commissioner Radley; Commissioner Delphine was absent. Commissioner Rhine closed the issue and said the TWD did not see a reason to participate in this study.

Commissioner Radley motioned that Mr. Balfour's letter of opinion be released to the public domain. Commissioner Froude seconded and the motion was approved by unanimous vote.

## **5. Beginning of Budget Process**

- **Select Budget Officer**

Commissioner Froude volunteered to be the budget officer and Board unanimous approved.

## **8. & 9. Water Supply Update and IWB Update**

(Commissioner Froude asked Mr. Koellermeier to combine the IWB Update with his update.)  
Engineers from the Sherwood and Tualatin Valley Water District (TVWD) made presentations to the IWB on their projects for development of the Willamette River as a water source. The IWB discussed it and Tigard Water District

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authorized Mr. Koellermeier to draft a letter for the Chair's review. The draft is being edited. Recommendation of the City Council is that participation in the Sherwood project would not be beneficial to the Tigard service area, but participation in portions of the TVWD project that develops north/south pipeline activities, etc., would be beneficial. Recommendation was that we continue to explore that option. The letter will be presented to the City Council who can accept it or modify it before sending to TVWD and Sherwood.

Portland Contract – The City of Tigard, along with all the wholesalers, has been presented with two potential contracts (10- or 20-year contract) that are essentially the same. The only difference is profit for the City of Portland. The 20-year contract profit is tied to an index called the bond buyers index; the 10-year contract profit is the bond buyer's index, plus 1 percent. The IWB will make their recommendation to Council next month. City Council needs to take action on those contracts the night of May 23<sup>rd</sup>. Mr. Koellermeier is recommending the 10-year contract. It is a take or pay contract; we will pay for use of that water – about a \$25m commitment for the 10-year period whether we use the water or not.

Lake Oswego Negotiations – Mr. Koellermeier will be involved in the proposal and interview process for the two consultants in the Tigard/Lake Oswego study, making a recommendation and getting a contract awarded. Lake Oswego will be the contracting agency and results of the study should be completed by September or the first part of October.

Water Supply Issues – The wet spring has filled reservoirs and it is not anticipated we will have any shortage. The ASR well is still filling to meet our demands as they come up.

#### 10. Update on Water Related Educational Information – Marc Delphine

This topic will be covered at the next meeting.

#### 11. Non-Agenda Items

Commissioner Zeider asked what preparations were being made for the Bird Flu pandemic. Mr. Koellermeier indicated the City of Tigard was participating in two different groups that deal with that issue.

- Portland Area Consortium of Water Providers has an emergency services group and they are working on the pandemic response issue
- Office of Consolidated Emergency Management (OCEM) is preparing a response plan that would affect all the districts in the area

#### 12. Set next meeting date – May 22, 2006, at 7:00 p.m.

#### 13. Adjournment

At 9:37 p.m. Commissioner Froude motioned to adjourn the meeting, Commissioner Zeider seconded the motion and the board's vote was unanimous.

Twila Willson

Twila Willson, TWD Recording Secretary

Date: 5/23/06